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November 27, 1996

Via Overnight Courier

Federal Communications Commission
Office of the Secretary
1919 M Street, N.W.
Washington, D.C. 20554

Re: America's Carriers Telecommunications Association
Ex Parte Presentations to Common Carrier Bureau
FCC CC Docket 96-61/Second Report & Order, FCC 96-424

Dear Commission Secretary:

Pursuant to FCC Rule 1.1206, on behalf of the America's Carriers Telecommunications Association ("ACTA"), we submit two copies of ex parte presentations made to the Common Carrier Bureau in reference to the Commission's Second Report and Order in CC Docket No. 96-61, FCC 96-424, adopted October 29, 1996 and released October 31, 1996.

A written ex parte communication in the form of a memorandum was delivered to the staff members of the Bureau. That memorandum is attached hereto.

On November 26, 1996, the undersigned, accompanied by ACTA's Washington representative, Carl Tuvin, met with the following members of the Policy and Program Planning Division of the Bureau -- Richard Welch, Chief; Jordan B. Goldstein, Attorney; and Christopher M. Heimann, Attorney; and the following members of the Competitive Pricing Division -- James D. Schlichting, Chief; Judith A. Nitsche, Tariff and Price Analysis Branch; and Calvin Howell, Public Utilities Specialist.

The meeting with the staff concerned the content of the attached memorandum and the discussions elaborated on the points and concerns set forth therein. The discussion focused on the what was different about the communications industry that warranted the continued need for tariffs with particular focus on the unique and onerous problems faced by small carriers by those differences, the significant legal uncertainty caused by the cancellation of tariffs, the costs that would be imposed thereby, the adequacy of the analysis of the impact on small carriers under the

Regulatory Flexibility Act, the problems created by rogue agents, large competitors' unmatchable advertising budgets, fraud against carriers by consumers, consumer reluctance to sign written forms, the legal authority of the Commission to overturn the filed tariff doctrine, the impact of the gratuitous suggestions for state consumer fraud actions once the filed tariff doctrine is removed, the threat of exposure to massive and frivolous litigation by private parties and state bodies and the alternatives of permissive tariffs and/or outsourcing the tariff filing requirements to a private entity or entities and preserving thereby the filed tariff doctrine.

In addition, the Staff was informed that ACTA's members had overwhelmingly voted to appeal the Second Report & Order; that petitions for reconsideration were also being considered and that having to deal with the manifold changes occurring in the industry as a result of the Telecommunications Act of 1996, the numerous orders implementing that Act issued by the Commission, the 8th Circuit stay, the need to undertake negotiations and/or arbitration to enter the local exchange market, the need simply to keep abreast of the various state actions and orders on interconnection, resale discounts and unbundling, and the requirement to file applications and tariffs with the states to obtain authorizations to provide local service, made the need to consider the implications of canceling interstate tariffs nigh impossible for small carriers to manage effectively or with any degree of comfort.

The meeting commenced at approximately 2:10 pm and ended at approximately 2:55 pm.

Should there be any questions, please contact the undersigned.

Very truly yours,

Charles H. Helein

cc: Attending FCC Staff Members
Carl Tuvin
ACTA Board

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EX PARTE PRESENTATION

Outline of ACTA's Regulatory Flexibility Act Analysis of the FCC's Detariffing Order (Docket No. 96-61)

The following is a brief summary of some of the issues ACTA believes would be useful in a motion for stay and appeal of the FCC's detariffing order. This summary is for discussion purposes only as we consider the merits of the case.

Generally, ACTA sees five issues that should be addressed in an appeal based on the Commission's failure to render a proper analysis of the Regulatory Flexibility Act ("RFA"). The detariffing order will adversely affect small carriers for the following reasons:

1. Small Carriers Will Suffer From Increased Liability Exposure.

In its Order, the FCC dismissed the immense significance of the protection afforded by the judicially created "filed tariff" doctrine and standard limited liability provisions. The Order exposes small carriers to: compensatory and punitive damage claims, class action suits, abusive state enforcement actions and other litigation that will ruin small carriers' ability to operate profitably.

The Commission's Order considers none of these factors. Rather than giving a cogent examination and consideration of these factors, the Commission simply directs its attention to its preconceived determination and uses assumptions to bootstrap the results it set out to achieve. For example, the Commission makes no effort to examine the financial exposure of small carriers who no longer are able to limit their liability via tariffs. The Commission seems to invite class action suits and exhibits a thinly veiled contempt for carrier practices by trumpeting the "rights of consumers" (even though consumer groups sided with the IXC industry in this rulemaking). The Order also tacitly asks states to assert consumer laws overzealously. The Commission made no effort to weigh the burden on small carriers, thus rendering them easy prey to everything from negative advertising about "no name companies" to media prejudice. Without a filed tariff, these existing competitive disadvantages that currently burden the competitive IXC industry will be

exacerbated.

2. Mandatory Detariffing Will Greatly Increase Transaction Costs for Small Carriers.

In the wake of the Commission's competitive carrier proceedings in the early '90s, AT&T created approximately 5,000 contract tariffs over a 4 year period. On average, AT&T was able to negotiate contracts at the rate of approximately 1,250 per year or 105 per month. A small carrier with 25,000 customers would need 20 years to renegotiate and obtain replacement contracts with its existing customer base. Even if it were assumed that because the customers were existing customers of the small carrier, it would take only half the time to negotiate a contract with a new customer, it would still take 10 years for the small carrier to renegotiate and conclude 25,000 contracts just to keep its existing customers.

If a small carrier is growing at the rate of 5% per year when mandatory detariffing takes effect, it would have to negotiate an additional 1,250 contracts per year, or about 105 more contracts each month in addition to the 1,250 contracts it would have to renegotiate with existing customers, just to keep pace with market demands.

Assume a cost of sale of $1,000 per contract. This would cost a small carrier $105,000 per month and $1,260,000 per year simply to handle the growth in customers at 5%. To this must be added the cost of renegotiating 210 contracts a month (assuming, for the sake of argument, that small carriers could move twice as fast as AT&T in renegotiating existing customers). This figure ups the costs to $310,000 per month or $3,780,000 per year. Over 10 years, this small carrier could incur up to $37,800,000 in transactional costs. A small carrier with 25,000 customers grosses $6,000,000 per month and operates on a gross margin of 26% would eat up 20% of its gross margin simply to maintain its existing customer base and allow for 5% growth per year.

These figures do not reflect the added cost of administering thousands of contracts that small carriers do not now have to administer. New computer software, new personnel and new storage and retrieval facilities would be needed to track and retrieve each contract whenever any type of question arose.

The Commission's gratuitous statements that a form contract may be used finds no factual basis in the record. There is no evidence that form contracts do not impose significant costs to create, negotiate, execute and administer in any event. Even if a form contract were usable, industry experience with LOAs indicates obtaining a signature often proves impossible. Hence, there is no evidence that small carriers may successfully rely on form contracts, no matter how "abbreviated" the terms and conditions may be.

The Commission's reliance on the analogy of real estate contracts or credit card contracts is not relevant to the unique nature of the telecommunications industry. With credit card contracts, a

user's liability is limited to $50 if the card is stolen or lost. Such a limitation of liability, makes it much easier for the public to accept the terms of the credit card issuer. Moreover, each time the credit card is used, authorization of that use, and therefore reverification of the contractual arrangement, is made by a signed credit card receipt or by some form of verbal authorization. Such procedures do not apply to a form contract for telecommunications. Small carrier's cannot underwrite all charges on a customer's BTN or calling card above $50. Nor do users need to sign any receipts when using their telecommunication services each time. Nor is any user verification possible as with credit cards used over the telephone (such as obtaining address information, expiration dates, etc., before accepting a charge on the card).

3. Competition Will Be Hurt by an Inability to Obtain Competitive Information In a Timely Fashion.

The Commission dismissed concerns that resellers will be disadvantaged by being deprived of necessary information on the discounts being made available by the largest carriers to their largest customers by stating that the large carriers will be required to disclose this information for the asking. The Commission is sticking its head in the sand and ignoring the consistent and numerous complaints resellers have lodged over their treatment by underlying carriers. Without such tariffs, it will be impossible to unearth the real terms and conditions of discount offerings for all that would be necessary is for the underlying carrier to deny the existence of any discount plan identical or similar to what the reseller is seeking. Resellers will not be able to obtain such information from large users who naturally will consider the discount offerings they receive as proprietary. Even if the reseller is finally successful in unearthing any relevant information, it will be obtained too late to be of competitive significance or will be after damages have already been incurred from the delay and expense required to force disclosure of the rates, terms and conditions. The Commission makes no effort to consider or address these issues in its main discussion or in its RFA analysis.

4. The Complaint Process Is Ineffective, Prohibitively Costly and Imposes Lengthy Periods of Uncertainties On Small Carriers Even With the New Five Month Deadline Because of Court Appeals.

The Commission drags out this excuse with unabashed regularity every time it wishes to avoid dealing with a difficult policy issue, with facts that contradict the correctness of the policy determination the Commission has made up its mind to make regardless of troublesome facts strongly indicating that the basis does not exist to support its policy goals. The truth is that small carriers cannot effectively use the complaint process which doesn't work. Regardless of this history, the Commission makes no examination of the impact on small carriers forced to resort to the complaint process in a non-tariffed environment. Note too, that this environment is unprecedented. While non-dominant carriers were free not to file tariffs before the FCC's forbearance policies were declared unlawful, the fact was that AT&T did file tariffs as the dominant carrier and the other large carriers voluntarily did so as well. Hence, the filing of complaints was assisted by having tariffs to

which to refer. Such will not be the case now, but the Commission makes no meaningful analysis of the different circumstances that now pertain.

5. Certification Requirement Is Unworkable - Violates 5th Amendment Guarantees, Subjects Carriers to Unreasonable Risks of Liability.

The Commission's requirement to certify that the carrier has complied with the rate averaging and other requirements under criminal penalties fails to analyze the impact on small businesses arising from the potential constitutional issues of self-incrimination, the exposure to civil penalties arising from inadvertent and/or rogue agents non-compliance with such requirements, risks made all the more onerous because the small carrier will no longer have the protection of providing its people with a filed tariff and instructing them that they must strictly adhere to its terms.

Additional Issues

Further analysis and reflection is likely to produce other instances of harm to small carriers the Commission clearly failed to address. In addition, the action is generally challengeable based on the overall lack of record evidence support for its bootstrap assumptions that detariffing will produce more competition. One ironic example concerns the Commission's treatment of tacit price collusion. After relying on detariffing to eliminate the potential for tacit price collusion, it makes a final specific finding that there is no evidence of any such collusion in the marketplace.